Regal Cinemas, Inc. *and* Local 370, International Alliance of Theatrical and Stage Employees *and* Northern Indiana Theatrical Local No. 125, a/w International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists & Allied Crafts of the United States and Canada, AFL–CIO *and* Projectionists Local No. 364, I.A.T.S.E. a/w International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, AFL–CIO (I.A.T.S.E.). Cases 5–CA–27454, 25–CA–25322, 25–CA–25322–2, and 8–CA–29503

June 20, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On April 12, 1999, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief.[1] The General Counsel filed cross-exceptions and a supporting brief. Charging Party Local 125 filed limited exceptions and a supporting brief. Charging Party Local 364 and Charging Party Local 370 each filed an answering brief, as did the General Counsel, joined by Charging Party Local 125. The Respondent filed replies to each answering brief, and an answer to the General Counsel's cross-exceptions. The Respondent also filed an objection/motion to strike the General Counsel's answering brief. The General Counsel filed a response.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions except as modified below and to adopt the recommended Order as modified.[4]

1. In adopting the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union about decisions to lay off unit projectionists and transfer work to nonunit employees and by implementing those decisions, we emphasize his finding that the reclassification or transfer of bargaining unit work to managers or supervisors is a mandatory subject of bargaining where it has an impact on unit work. *Land O'Lakes, Inc.*, 299 NLRB 982, 986–987 (1990); *Hampton House*, 317 NLRB 1005 (1995). Clearly, that has occurred here. The Respondent both transferred unit work to existing managers and also hired new assistant managers to perform it. Therefore, the work transfer was a mandatory subject of bargaining. Id. Accordingly, we find it unnecessary to pass on the Respondent's additional contention that the existing or newly hired assistant managers who performed unit work were also statutory supervisors, or the judge's discussion of the supervisory issue.

2. In adopting the judge's finding that the Union did not waive bargaining as to the Respondent's decision to transfer work from projectionists to manager/operators and the implementation of that decision, we find that the decisions were not founded on any new technological development.[5] Thus, the Respondent continues to employ the same methods and techniques for showing movies that it employed before it eliminated the dedicated projectionist position. The only obvious difference is in the identity of the persons performing projectionist tasks and duties, which tasks and duties also remain unchanged. Further, there is no clear linkage between the relevant technology and the elimination of the projectionists in favor of manager/operators. Cf. *Fast Food Merchandisers*, 291 NLRB 897, 899–900 (linkage between layoffs and the opening of Respondent's Florida facility); *Litton Business Systems*, 286 NLRB 817, 819–820 (1987) (employer's decision to lay off 10 employees was an effect of its decision to transfer cold-type work to its other plants and convert to a strictly hot-type operation at the location in question). Even assuming arguendo that the decisions to eliminate projectionists and transfer their work did result from technological development, we find that there was no clear and unmistakable waiver of bargaining regarding the allocation of the work

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] We deny the Respondent's objection/motion.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] We correct certain inadvertent errors in the notices referred to as "Appendix B" and "Appendix C" in the judge's decision. A corrected copy of each notice is appended.

[5] Respondent argues that decisions based on technological developments are immune from bargaining because of the management-rights clause. The clause reads:

> The Company shall have the right to introduce new or improved work methods, facilities, equipment, machinery, processes and procedures of work and to change or eliminate existing methods, facilities, equipment, machinery, processes and procedures of work and to automate. The Company agrees to negotiate the effects of such decisions on the employees.

among different classifications of employees. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Trojan Yacht*, 319 NLRB 741, 742–743 (1995).[6]

3. The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by conditioning severance pay for employees represented by Local 125 on their willingness to sign a release. We disagree.

The complaint alleged that the Respondent insisted that permanently laid-off employees sign releases as a condition of receiving severance pay and that this condition was not a mandatory subject of bargaining. The judge found that although severance pay was an effect of the Respondent's decision to lay off projectionists and transfer their work to managers, and thus was a mandatory subject of bargaining, the severance release was a permissive subject on which the Respondent could not insist. Citing *Borden, Inc.*, 279 NLRB 396, 399 (1986), the judge found the Respondent's insistence on such a release was unlawful.

We conclude that *Borden* is distinguishable from the instant case. In *Borden*, the respondent proposed a general release (i.e., one that absolved it of all future claims by laid off employees arising from the employment relationship). Although the respondent appeared to concede that a general release was ordinarily a permissive subject of bargaining, it argued that its general release proposal was so intertwined with the union's severance pay proposal as to be a mandatory subject.[7]

The *Borden* judge rejected the argument. He found that the permissive and mandatory subjects in that case (the general release and severance pay, respectively), were not interdependent. In this regard, the judge noted that the general release and severance pay proposals were not factually linked. He found that the general release provision was neither part of the respondent's original proposal nor did it appear to have been added as a quid pro quo for any concession by the union. The judge further noted that severance pay could be paid pursuant to a severance agreement without the execution of a general release, and that—were the respondent's argument accepted—a permissive subject would become mandatory wherever it was simultaneously presented with a mandatory one. The Board adopted the judge's decision.

Contrary to the judge, we do not find that *Borden* is applicable here. Thus, unlike *Borden*, it is clear that the Respondent's oral proposal for an employee release was a quid pro quo for the proposal that permanently laid-off projectionists would receive severance pay. Second, contrary to the clear evidence in *Borden*, the record here does not establish that the Respondent was insisting to impasse on a *general* release of all employee claims against it. Although the Respondent had obtained such releases in some prior dealings with other unions, the record fails to establish that this was the type of release it was proposing in this case. Indeed, the Respondent merely proposed, orally, that employees sign "release agreements." Further, the evidence suggests that the Respondent was prepared to bargain over the terms of the release and was thus open to a narrower release.[8]

The General Counsel has not shown that the Respondent was seeking a general release, rather than a release of only those claims arising from the termination of the employees—the very same employment transaction that occasioned bargaining over severance pay. In this situation, bargaining over such a specific release and bargaining over severance go hand in hand. The bargaining is focused on the effects of the termination. Thus, severance pay and claims arising from the termination (such as discriminatory discharge claims) are properly viewed as reciprocal effects: benefits to employees, costs to the employer. From the employer's perspective, it would be

[6] Further, Members Truesdale and Liebman note that, assuming that the Respondent's decision to transfer projectionists' work was a result of technological change, the contract clause that the Respondent relies on in support of its waiver contention arguably would *require* it to bargain with the Union before making that decision. While the clause grants the Respondent the right to introduce new technological methods, it expressly requires bargaining with the Unions over the effects of new technologies. Allocation of the affected work between unit and nonunit employees would constitute such an effect, and thus the contract would require the Respondent to bargain with the Unions about such decisions.

[7] In rejecting this argument, the *Borden* judge contrasted that case with *Sea Bay Manor Home for Adults*, 253 NLRB 739 (1980), where the Board found that a permissive term, interest arbitration, rose to the level of a mandatory term when the parties agreed to use interest arbitration to establish every provision of the contract being negotiated. The Board in *Sea Bay* stated that the agreement to employ interest arbitration was designed to establish all the terms and conditions of employment. Accordingly, it had an immediate and significant effect on unit employees. In these circumstances, the parties' agreement on interest arbitration was so intertwined with and inseparable from the mandatory terms and conditions for the contract being negotiated as to take on the characteristics of the mandatory subjects themselves.

[8] Members Truesdale and Liebman note that the Board has generally taken the view that in most circumstances a release is a permissive (not a mandatory) subject of bargaining. On this view, a general release, like the one at issue in *Borden*, almost necessarily implicates individual claims that are not closely related to bargained-over terms and conditions of employment. (In *Borden*, for example, the release would have extinguished claims arising from exposure to toxic substances.) The ability to insist to impasse on the release, then, is not essential to facilitate bargaining over a mandatory subject, such as severance pay. In contrast, a *specific* release limited to claims arising out of a particular employment transaction presents different considerations.

Chairman Hurtgen agrees that *Borden* is distinguishable and that the instant record does not establish that the Respondent sought a general release. He therefore finds it unnecessary to pass on whether *Borden* was correctly decided or on whether, had the Respondent sought a more general release, a different result would obtain.

difficult to bargain meaningfully over severance without being able to fix its costs. A specific release tied to the termination addresses that issue. Like severance, it is one of the terms on which the employment relationship is ended. It is not unfair, in the context of bargaining over severance benefits flowing from the act of termination, to require the union to pursue a bargain that fully resolves the subject.

Further, holding that, in these circumstances, an employer could *not* insist to impasse on a specific release would frustrate honest and effective bargaining. That is, if a union proposed severance pay with no release, the employer ultimately would be forced either to accede or to commit an unfair labor practice by conditioning agreement on a release. No reasonable purpose would be served by forcing such a choice.

Certainly, we must be careful to ensure that employees are not improperly discouraged from seeking to vindicate their legal rights, including access to the Board. See, e.g., *Reichhold Chemicals,* 288 NLRB 69 (1988), enfd. 701 F.2d 172 (5th Cir. 1983) (proposed waiver of *future* right to Board access is contrary to fundamental policy of Act, despite literal scope, since waiver could have chilling effect). However, that concern is not raised in the severance-limited release situation. In that situation, the employment relationship is being terminated and the release is clearly tailored to that transaction, as opposed to any future-arising claims.

Finally, we find support for our holding in cases where the Board has suggested that there must be some flexibility in permitting employers at least to link proposals on permissive subjects with proposals on mandatory subjects. See, e.g., *Dependable Storage, Inc.,* 328 NLRB 44, 50 (1999).

Accordingly, because the evidence fails to establish that the Respondent insisted to impasse in bargaining that severance pay for employees represented by Local 125 was conditioned on their agreement to sign a general release, we dismiss this complaint allegation.

4. The Respondent contends that the judge's recommended remedy, which includes, inter alia, requirements that the Respondent reestablish the projectionist position and offer reinstatement to its unit employees, is overly burdensome. We reject this contention. We note that the remedy would not require the Respondent to make capital expenditures. Further, unlike *Coronet Foods, Inc. v. NLRB*, 158 F.3d 782, 795–798 (1998) (Board abused its discretion in ordering restoration of trucking department), the instant remedy would require neither the importation of expertise not now possessed nor the coordination of a host of activities that the Respondent lacks the experience and expertise to effectively handle. Id. at 796. Nor is the *Coronet* court's doubt as to whether and how the terminated employees would benefit from the restoration order applicable here. Id. at 797.

We nevertheless find, however, that the Respondent is not precluded from presenting new evidence (i.e., facts occurring after the close of hearing) on the restoration issue at the compliance stage of this proceeding. See, e.g., *Lear Siegler, Inc.,* 295 NLRB 857, 861–862 (1989).[9]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Regal Cinemas, Inc., Knoxville, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(b) and reletter the subsequent paragraph.

2. Delete paragraph 2(c) and reletter the subsequent paragraphs.

3. Substitute the attached notices for those of the administrative law judge (App. A requires no modification).

CHAIRMAN HURTGEN, concurring in part.

1. Although I agree with my colleagues that the Respondent unlawfully failed and refused to bargain with the Union, I would not, as the judge did, analyze this case under the rubric of *Fibreboard v. NLRB*, 379 U.S. 203 (1964), and *Torrington Industries*, 307 NLRB 809 (1992). In my view, this case is to be decided under the test set forth in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). Respondent's decision falls within the third type of management decision described in *First National Maintenance*.[1] Thus, it had a direct impact on employment, since (unit) jobs were eliminated, but had as its focus the economic profitability (efficiency) of the enterprise.

In such a case, bargaining is to be required if the benefit for labor-management relations and the collective-bargaining process outweighs the burden placed on the conduct of the

[9] The General Counsel excepts to the judge's failure to make findings with respect to the complaint allegation that the Respondent violated Sec. 8(a)(3) and (1) of the Act by eliminating the jobs of the projectionists represented by Local 370. We find that, assuming that the evidence adduced on this point by the General Counsel is credited, that evidence is insufficient to establish the violation. We therefore do not find merit in the General Counsel's exception.

[1] The Court in *First National Maintenance* divided managerial decisions into three categories: (1) decisions about, for example, advertising and promotion, product type and design, and financing arrangements, having only an indirect and attenuated impact on the employment relationship; (2) other decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules, that are almost exclusively an aspect of the relationship between employer and employee; and (3) decisions with a direct impact on employment, since they result in the elimination of jobs, but whose focus is economic profitability. Id. at 676–677.

business. Id. at 674–680. That burden, in the instant case, seems comparatively light. The Respondent has not changed the scope and direction of its enterprise. It continues to show movies at the same facilities and using the same equipment and techniques that it did before it eliminated the dedicated projectionist position. Although there was some new hiring, a good deal of the unit work was apparently transferred to managers who were already in place. And, as to the additionally hired assistant managers, they were assigned, as a portion of their jobs, the precise projectionist duties that the unit employees previously had performed. Further, there does not appear to be any financial exigency that would have rendered decisional bargaining especially burdensome here.

As to the benefits for the collective-bargaining process, the Respondent contends that its decision to lay off projectionists and reassign their work was not amenable to bargaining, since there were no concessions the Union could have offered that would have dissuaded the Respondent from going ahead with its plans. I find that the Respondent has not demonstrated that this is the case. The Union, had it been given an opportunity to do so, could have proposed some rearrangements of duties similar to those undertaken at other theaters operated by the Respondent, allowing at least some projectionists to retain jobs.2

2. I also agree with my colleagues that the Union retained its bargaining rights with respect to the Respondent's decision to lay off projectionists and reassign their work to nonunit personnel. To the extent that this conclusion is based on an analysis of the management-rights clause relied on by the Respondent, however, I would not, as the judge did, apply the "clear and unmistakable" standard. I would, however, find that under a "contract coverage" analysis, the Respondent's conduct was not privileged. See *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993); *Central Illinois Public Service Co.*, 326 NLRB 928, 935 fn. 23 (1998) (concurring in the finding that the respondent unlawfully discontinued employee benefits during a lockout because, under a "contract coverage" analysis, rather than a "waiver" analysis, the contract did not privilege the respondent's conduct).3

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to give the Union, Local 125, an opportunity to bargain collectively concerning our decisions to lay off bargaining unit projectionists and to transfer unit work to nonunit managers and assistant managers before implementing those decisions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the unilateral changes made with respect to the transfer of projectionist unit work to managers and assistant managers and, on request by the Local Union, bargain collectively in good faith concerning our decision to permanently lay off bargaining unit employees and to transfer bargaining unit work to managers and assistant managers.

WE WILL within 14 days from the date of this Order offer immediate and full reinstatement to all unit employees who were permanently laid off as of March 28, 1997 to their former positions or, if such positions no longer exist, to substantially equivalent employment, without prejudice to their seniority or to other rights and privileges enjoyed by them.

[2] Respondent also contends that the decision was not a mandatory subject because it assigned work to supervisory or managerial personnel rather than to employees. I do not reach the issue of whether these persons are supervisors or managers. Assuming arguendo that they are, I conclude that the transfer of unit work to supervisors and managers is a mandatory subject.

[3] In agreeing with the judge's conclusion, I do not rely on his statements to the effect that general contract language is necessarily unclear, or on his reference, in buttressing his conclusion that the management-rights clause did not unambiguously specify the Respondent's intentions, to the fact that in an earlier negotiation the Respondent had agreed to a partial retention of the projectionist position.

WE WILL make whole, with interest, all such laid-off unit employees for any lost wages they may have suffered as a result of the above-described unlawful unilateral changes we made in the manner set forth in the remedy section of the administrative law judge's decision.

REGAL CINEMAS, INC.

APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT FAIL and refuse to give the Union, Local 364, an opportunity to bargain collectively concerning our decisions to lay off bargaining unit projectionists and to transfer unit work to nonunit managers and assistant managers before implementing those decisions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the unilateral changes made with respect to the transfer of projectionist unit work to managers and assistant managers and, on request by the Local Union, bargain collectively in good faith concerning our decision to permanently lay off bargaining unit employees and to transfer bargaining unit work to managers and assistant managers.

WE WILL within 14 days from the date of this Order offer immediate and full reinstatement to all unit employees who were permanently laid off as of October 12, 1997 to their former positions or, if such positions no longer exist, to substantially equivalent employment, without prejudice to their seniority or to other rights and privileges enjoyed by them.

WE WILL make whole, with interest, all such laid-off unit employees for any lost wages they may have suffered as a result of the above-described unlawful unilateral changes we made in the manner set forth in the remedy section of the administrative law judge's decision.

REGAL CINEMAS, INC.

Karen Itkin Roe, Esq., Joanne Mages, Esq., and *Rufus L. Warr, Esq.*, for the General Counsel.
Raymond L. Smith Jr., Esq., of Knoxville, Tennessee, for the Respondent.
I. J. Gromfine, Esq. of Alexandria, Virginia, *Paul T. Berkowitz, Esq.,* of Chicago, Illinois, and *Dale E. Short, Esq.,* of Westlake, Ohio, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Richmond, Virginia, on November 19 and 20, 1998, in Fort Wayne, Indiana, on December 14 and 15, 1998, and in Cleveland, Ohio, on January 19 and 20, 1999. Subsequent to an extension in the filing date all parties filed briefs.[1] All proceedings are based upon initial charges filed April 23, 1997, in Case 25–CA–25322, November 26, 1997, in Case 8–CA–29503, and November 28, 1997, in Case 5–CA–27454 by Northern Indiana Theatrical Local No. 125, a/w International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists & Allied Crafts of the United States and Canada, AFL–CIO, Projectionists Local No. 364, I.A.T.S.E. A/W International Alliance of Theatrical State Employees, Moving Picture Technicians, Artist and Allied Crafts of the United States and Canada, AFL–CIO and Local 370, International Alliance of Theatrical and Stage Employees, respectively.

By order dated October 23, 1998, the several cases were consolidated. The Regional Directors' complaints, as amended, allege that Respondent Regal Cinemas, Inc. of Knoxville, Tennessee, has violated Section 8(a)(1) and (5) of the National Labor Relations Act by failing and refusing to bargain in good faith with the three union locals by refusing to bargain about its decision to transfer work performed by projectionist unit employees to theater managers and assistant manager, by terminating all unit employees, and by demanding that union members sign a release in order to receive severance pay.

Upon a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is engaged in the operation of movie theaters at various points throughout the United States. It has annual gross revenues in excess of $500,000 and it annually purchases and receives goods and materials valued in excess of $10,000 directly from points outside Virginia, Indiana, and Ohio. It admits that at all times material is and has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union Locals are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent was founded in 1989 and since then has grown national in scope, generally through the acquisition of smaller, regional theater chains. A typical theater operates with a staff compliment consisting of managers, assistant managers, concessionists, box office employees, ushers, and projectionists. For the last 10 years, however, the trend for the Respondent and the theater industry had been to convert to so-called manager/operated theaters whereby managers and assistant managers operate the projection equipment and thereby eliminate the dedicated projectionist. This trend has been especially true in theaters that have a smaller number of screens in each facility.

The normal duties of the projectionists included: "threading" the films through the projectors prior to the scheduled showing time of a movie after the equipment has been tested and is

[1] The Respondent's unopposed motion to correct the transcript, dated March 12, 1999, is granted and received into evidence as R. Exh. 19.

functioning properly; monitoring the equipment throughout the showing of a movie to ensure that it is feeding correctly, is "in frame" and in focus and that the sound equipment is operating properly at appropriate levels; changing "trailers" to movies when necessary and completing the appropriate paperwork; "makeup" of four or more separate reels of new movies for showing; performing the "breakdown" of older movies that are no longer being shown at a particular theater and are scheduled to be shipped out; and cleaning the projection equipment, as well as the projection booth, and fixing minor problems such as broken belts, loose splices, or when the film drifted out of focus or burned out bulbs.

In 1995, the Respondent acquired eight theaters located in the Richmond area from Neighborhood Entertainment, Inc.: the Ridge; Willow Lawn; Cloverleaf; Genito; Spotsylvania; Crater; Southpark; and Seminole. Local 370 has represented the projectionists' employed in these Richmond theaters since 1921 and it had a collective-bargaining agreement covering the projectionist employees in the eight theaters effective by its terms from 1991 through 1994.

The Respondent first entered the theater market in the Fort Wayne area in 1993 with the purchase of the Quimby, Georgetown, Holiday, and Coventry theaters previously owned by Mallers-Spirou. The projectionists were presented by Local 125 and it and the Respondent thereafter entered into three separate contracts that were effective from June 4, 1993, until June 3, 1995. During the term of these contracts, Respondent acquired additional theaters in the Fort Wayne area from General Cinemas and it and Local 125 entered into two additional contracts covering these theaters effective January 21, 1994, until June 3, 1995. None of the initial contracts entered into between Local 125 and Respondent contained a management-rights clause. Although these agreements were slated to expire in 1995, the parties, by inaction, allowed the contracts to renew themselves for 6 months and in January 1996, Respondent gave notice that it was seeking to terminate the contracts.

In 1994 the Respondent purchased Montrose Movies from National Theater Corporation and took over the operation of five theaters in the Akron, Ohio area: the Montrose Movies 12 in Copley, Hudson Cinema 10, Hudson; Independence 10 Theater, Akron; Interstate 14 Theater, Green Township; and Lake Cinema 8 Theater, Barberton. The projectionists were represented by Local 364 covered by a collective-bargaining agreement, which was effective from January 1, 1993, to November 30, 1995. The contract between the Union and National contained a management-rights provision, which stated:

> The Employer shall have the right to make reasonable rules and regulations necessary for the conduct and management of its business, and employees thereunder shall be required to obey all such rules and regulations insofar as they do not conflict with the terms of this Agreement. It is understood the projectionist(s) work under the direction of theater management.

After Respondent purchased the Montrose Theater the Respondent and the Union negotiated a collective-bargaining agreement covering the projectionist at the Montrose effective from September 1, 1994, to September 1, 1997, and did not contain a management-rights clause.

Subsequently, Respondent opened the Interstate theater in Green Township, Ohio, and the Hudson Cinema 10 in Hudson, Ohio, and the Union became the collective-bargaining representative of the projectionists at both theaters. In May 1995 Local 364 and Respondent began negotiations for a collective-bargaining agreement to cover projectionists at the Interstate, Hudson, and Montrose theaters, although the contract covering Montrose was in effect at that time.

The contract was signed November 9, 1995, to be effective from October 13, 1995, to October 12, 1997, that contained a management-rights provision (art. V), however, during negotiations for the contract there had been no discussion between the parties pertaining to the management-rights provision.

After the Union and Respondent signed the 1995–1997 collective-bargaining agreement, the Respondent opened the Independence 10 Theater in Akron, and took over operation of Lake Cinema 8 Theater from the City of Barberton. The Union became collective-bargaining representative of the projectionists at the Independence 10 and on September 25 and October 3, 1996, the parties agreed to an addendum to the collective-bargaining agreement covering these projectionists.

The contracts in effect between the Respondent and the several Local Unions in 1997, contained general management-rights clauses and in each instance, the following specific language:

> The Company shall have the right to introduce new or improved work methods, facilities, equipment, machinery, processes and procedures of work and to change or eliminate existing methods, facilities, equipment, machinery, processes and procedures or work and to automate. The Company agrees to negotiate the effects of such decisions on the employees.

On January 16, 1997, Local 125 Business Representative Robert Bakalar wrote to Michael Kivett, Respondent's vice president of operations, seeking to begin negotiations for a successor collective-bargaining agreement for the one set to expire on March 28, 1997.

On January 23, Executive Vice President Greg Dunn replied that:

> Regal Cinemas has decided to go manager/operator at the theaters in question. Therefore, effective March 29, 1996, the unit employees will be permanently laid off.
>
> I look forward to meeting with you at your earliest convenience to discuss the effects of this decision.

Bakalar then contacted the Union's international president, sought the assistance of special International Representative Jack Lynch, and wrote to Dunn agreeing to meet. The Union also presented its "thoughts" for a new 3-year agreement, however, when the parties met on February 10, Vice President Levesque stated he was only authorized to discuss the effects of going manager/operator and did not respond to the Union's offer to negotiate concessions. A similar meeting occurred on February 19. On March 4 the Union wrote to the Respondent requesting another meeting and proposing to agree to the automatic bimonthly extension under that clause in the contract. On March 12 the company responded stating that its decision to go manager/operator was not negotiable, that time was running short and that the Union should request a time to meet and confer over the effects of the decision. The Union responded with a suggestion for compromise, not termination, but agreed to meet on March 21. The Respondent replied with a letter setting out the conditions for meeting (most specifically no waiver of its position), and requesting the Union's acceptance of the conditions. The Union declined to sign and when the parties met no negotiations of any kind occurred. On March 27 the Respondent gave the Union a severance pay proposal and the next day the employees were terminated at the end of their shifts and escorted from the theaters.

On July 21, 1997 (2.5 months prior to the expiration of its agreement with Local 364), the Respondent notified the Union that it intended to eliminate the projectionist position and requested a negotiation relating to the effects of its decision. The Union's representative believed that this notification communicated a nonnegotiable decision and that any attempt to change this decision would have been futile. Subsequently, on August 7, Business Agent John Hetsch requested a meeting and sent a letter to Vice President Dunn on August 25, also requesting a meeting. On September 17, Vice President Levesque contacted Hetsch acknowledging the difficulty in communication and on September 19, counsel for the Union, contacted Levesque requesting an opportunity to meet. Finally on October 2, the parties communicated by telephone and agreed to a meeting on October 8. The Union attempted to negotiate a new agreement retaining the projectionist position. The Respondent stated that its decision to convert to manager/operator was final and that it was only present at the meeting to negotiate the effects of its decision. No bargaining occurred and on October 12, at the end of their work shift, the employees were terminated and escorted out.

On September 22, 1997, Local 370 Business Agent Henry Berger wrote to Greg Dunn, Respondent's executive vice president of Regal Cinemas, noted that the 1995 contract was scheduled to expire in November, and requesting a meeting "to discuss a new contract." That letter crossed in the mail with a letter Vice President Levesque sent to Berger on September 16, 1997, in which the Respondent gave the 60-day notice of intent to terminate the contract as of November 23, 1997 and stated:

> Regal Cinemas has decided to go manager/operator at the theaters in question. Therefore effective November 24, 1997, the unit employees will be permanently laid off.
>
> I look forward to meeting with you at your earliest convenience to discuss *the effects* of the decision.

The parties met on October 29 in Richmond where the Union's attorney expressed the Union's great displeasure at the Company's unilateral decision to replace the projectionists with other employees, and charged that what the Company had done was illegal. The Respondent's

attorney made clear that the Company was not willing to discuss the Company's decision and insisted that the sole purpose of the meeting, was to discuss the effects of the decision—such as other jobs that might be available and severance pay. There were no further meetings and in an exchange of correspondence the Union could not obtain any indication that the Company was willing to discuss anything other than the effects of its decision to replace the projectionists represented by the Union with managers and/or assistant managers.

As of the end of their shifts on November 23, the Union projectionists in each of the five theaters covered by the collective-bargaining agreement were terminated and escorted out of the theaters.

III. DISCUSSION

Here, the record shows that a few months before the expiration of existing collective-bargaining agreements with three separate projectionist Union Locals, the Respondent notified them that it had made a decision to eliminate the unit position and to perform the work function with manager/operators, that it would bargain with them over only the effects of its decision and that its decision would be effective at the end of the existing agreements on March 28, October 12, and November 23, 1997, respectively. In each instance, the Union Locals sought to bargain over the decision itself but were rebuffed by the Respondent's insistence that it had the right to make this decision unilaterally.

Under normal circumstances it is an unfair labor practice if an employer unilaterally modifies or repudiates the parties bargaining agreement. Otherwise, a unilateral decision to end a bargaining relationship by transferring or reassigning all work performed by employees in the unit may be a mandatory subject of bargaining and therefore violative of the Act if the Union is not provided an opportunity to bargain (unless the employer's decision was dictated by core entrepreneurial reasons), see *Torrington Industries,* 307 NLRB 809 (1992); and *Fibreboard v. NLRB,* 379 U.S. 203 (1964), cited therein.

A. The Employer's Rationale

The Respondent contends that its decision to convert its involved theaters to manager, assistant manager operated theaters, and thereby eliminate the dedicated projectionists position, was purely a management decision which effected a change in the basic operations of its theaters and concerned the scope and direction of the enterprise. It also urges that it was not motivated by a desire to reduce labor costs and that even if the decision had the effect of reducing labor costs, the Union could not have offered any labor cost concession that would have altered the employer's decision.

It states that over the last 10 years it has reevaluated operations in regard to how the Company staffs it theaters and directed to capitalized on the automation of projection related equipment by evaluating an existing theater's equipment, physical layout, and personnel to ascertain the ability to convert the theater to manager operated. However, when the Respondent has acquired other theater circuits which employ projectionists, it has always been its custom to maintain the employment of the projectionists until other employment could be arranged and in situations where the projectionists were unionized to abide by the existing collective-bargaining agreements and generally entered into at least one collective-bargaining agreement with the Union.

The subject of conversion to manager/operators has been discussed as part of the negotiations of these past agreements and in Richmond and Fort Wayne several smaller theaters (generally with four screens) were converted by mutual agreement and in Akron a second projectionist position at one theater also was eliminated. Other theaters, generally those with the most screens (and therefore more work for a projectionist), retained a dedicated projectionist but at a cost to the unit employers in the form of wage concession of between $3.65 and $6.75 an hour.

Each of the new collective-bargaining agreements also included a management-rights clause (discussed further below), however, there is no specific reference in that clause to the right to convert to manager/operators and there is no evidence which shows any discussions during negotiation which specifically connected that clause with management's other generalized expressions of intentions or desires to expand its use of manager/operators.

The Union concedes that over the years prior to 1995 there have been technological developments which affected the work of projectionists, making it possible for a single projectionist to do what had required more than one projectionist in the past, however, all such technological changes had occurred long before 1995, and no pertinent technological developments occurred between 1995 and 1998.

While some of the Respondent's existing complement of theater managers and assistant managers were trained and assumed the projectionist work previously performed by unit employees, the Respondent did hire additional employees (although not necessarily on a quid pro quo basis), who are titled assistant managers2 and who perform the projectionist duties as well as certain other generalized duties with some elementary supervisory responsibilities over other employees such as ushers, and concession and box office workers. The Charging Party contends that a review of payroll records discloses that additional employees titled "Assistant Managers" have been paid slightly more than the legal minimum wage ($5.15 an hour in July 1997), and significantly less than the terminated union projectionists had been receiving.3

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[2] By pleading dated March 29, 1999, the Respondent moved to file a reply brief with an attached summary sheet in which it argues the payroll records show numerous managers also left employment and that the other parties analysis does not identify the different hours worked by assistants. It then argues that if one 40-hour-a-week assistant is replaced by two 20-hour-a-week assistants, no new position is created, however, it s own summary sheet fails to identify any such situations. It also questions the increased cost calculations alleged in the other briefs but agrees that does not mean to imply that cost "increased" as a result of the change and states that many variables can contribute to cost decreases in any particular month.

This reply brief was received after the preparation of my decision was completed and I find that there is no need to modify my generalized conclusions that some new assistant managers have replaced projectionist although not necessarily on a quid pro quo basis. Otherwise, however, I find that it would serve a useful purpose to have the Respondent's position on the other parties' analysis of the payroll exhibits as part of this record and the brief is hereby accepted for filing.

[3] For example:

> The Richmond area Ridge Theater in July of 1997 employed two projectionists at $9.25 an hour, two assistant managers, one of who had a salary of $450 every 2 weeks and the other a salary of $550 every 2 weeks, and a manager at a salary of about $500 per week. In July 1998, no one classified as a projectionist was employed. Instead there were four assistant managers one of whom had a salary of $600, a second had a salary of $520 every 2 weeks, the third an hourly rate of $6.25 an hour, and the fourth at an hourly rate of $6.50 an hour, and a manager who had a salary of about $520 a week.
>
> The Genito Theater in July 1997 employed two projectionists at $9.25 an hour, two assistant managers one at an hourly rate of $5.25 an hour, and the other at a salary of $540 every 2 weeks, and a manager at a salary of $1010 every 2 weeks. In July 1998 there was no one classified as a projectionist. Instead there were four assistant managers two of whom had salaries of $640 every 2 weeks, a third at an hourly rate of $7 an hour, and the fourth at an hourly rate of $7 an hour, and a manager at a salary of $980 every 2 weeks.
>
> Under the 1996 Fort Wayne collective-bargaining agreement unit employees working at the Conventry theater were paid $17 an hour, those unit employees at the Coldwater theater earned $12 an hour and unit employees working at the Holiday theater made $9.75. In 1997 and 1998, the manager of the Coventry theater earned between $490 and $540 a week, the manager of the Coldwater theater earned between $570 and $615 a week, and the manager of the Holiday theater earned between $415 and $460 a week.

B. The Obligation to Bargain

The Respondent urges that this case is governed by the decision of the Supreme Court in *First National Maintenance Corp. v. NLRB,* 452 U.S. 666, 676–677 (1981), and the Board in *Dubuque Packing, Inc.,* 303 NLRB 386 (1991), both dealing with plant relocation. I find, however, that in the instant case, we are dealing with a situation in which the Employer has continued to operate the same business at the same locations and the only change is in the identity of the employees doing the work. Accordingly, I find that the line of cases touching on the approach of the *Torrington Industries* and *Fibreboard* cases, supra, apply and that this decision should not turn on the *Dubuque* or the *National Maintenance* analysis.

In particular, I find that the relatively recent decisions cited by the Charging Parties and the General Counsel are controlling. In *Geiger Ready-Mix Co. of Kansas City,* 315 NLRB 1021 (1994), the Board concluded that the employer had a duty to bargain regarding a decision to lay off some unit employees and to transfer the work to nonunit employees when:

> Because the case concerns the reassignment of unit work rather than a plant relocation, *Torrington Industries*, supra, cited by the judge is controlling. The Board in *Torrington Industries* found that in cases factually similar to *Fibreboard Corp. v. NLRB*, when virtually the only circumstance the employer has changed is the identity of the employees doing the work, there is no need to apply the multilayered test of *Dubuque* to determine whether the decision is subject to the statutory duty to bargain because *Fibreboard*, supra, has already held that such decisions are mandatory subjects of bargaining. As in *Fibreboard,* the Respondent's assignment of nonunit employees to deliver concrete batches at Speaker Road involved the substitution of one group of workers for another to perform the same work at the same plant under the ultimate control of the same employer for lower wages.

The *Geiger* decision also cites *Holmes & Narver*, 309 NLRB 146 (1992), where the employer consolidated certain jobs in its motor pool, resulting in some layoffs, without negotiating with the union, which case also states:

> The Respondent did no more than consolidated and change the jobs in the motor pool—a small unit—and lay off a few employees elsewhere. Indeed, the Respondent's decision might fairly be analogized to increasing the production quotas of certain employees so that others may be laid off. We therefore do not see the need of engaging in any extended multistep analysis to determine whether the parties must bargain over layoffs thus linked to work assignments. See, e.g. *St. John's Hospital*, 281 NLRB 1163, 1166, 1168 (1986), enfd. 825 F.2d 740 (3d Cir. 1987) (adding significant new job duties, previously performed by others, to the work of unit employees is a mandatory bargaining subject), *Cincinnati Enquirer,* 279 NLRB 1023, 1031–1032 (1986) (phasing out job duties by transferring the duties to others, which resulted in elimination of unit position, is a mandatory subject of bargaining).

The Respondent asserts that its managers have merely added projectionist duties to their other duties and that it is distinguishable from *Geiger* where one group of nonunit drivers took over for unit drivers and where there also was a labor cost issue. The record, however, tends to show that additional assistant managers have been hired to replace, at least in part, the terminated projectionist. Thus, the situation here is not merely a case of existing managers assuming some additional duties. As noted, the Respondent makes much of its claim that the projectionist function was transferred to managers and assistant managers who also perform supervisory functions. While it is not necessary to decide the supervisory status of all these employees it otherwise appears that the assistant managers hired to replace the unit projectionist are often young, low wage, part-time students who, in their capacity as assistant managers have some minimal, incidental, assignment, scheduling, and disciplinary functions and powers over ushers and box office and concession employees that is exercised in a routine and preordained way as professional judgment designed to get some other work done in the time they are not otherwise occupied by their projectionist duties. Accordingly, some assistant managers appear to be similar to charge nurses who do not exercise the sort of independent judgment that would make them true statutory supervisors, compare *NLRB v. Grancare, Inc.,* 170 F.3d 362 (7th Cir. 1999).

In any event, the reclassification of or transfer of bargaining unit work to managers or supervisors is a mandatory subject of bargaining where it has, as here on impact on bargaining unit work, see *Land O'Lakes, Inc.*, 299 NLRB 982 (1990). In this case Administrative Law Judge John West, citing his *Cincinnati Enquirer* decision, supra, specifically addressed this issue. See also *University of Pittsburgh Medical Center*, 325 NLRB 443 (1998), and *Hampton House*, 317 NLRB 1005 (1995), where supervisors were hired (or promoted) to perform bargaining unit work without first notifying and offering to bargain with [the] union.

C. Waiver and the Management-Rights Clause

The Respondent has acknowledged that it has long term intentions to convert its theaters to manager operated and it is clear that in anticipation of its future actions, it proceeded to lay the groundwork during its 1995–1996 period of contract negotiations with its projectionist by negotiating the conversion of some theaters while, at the same time, it covertly sought to expand its options by the inclusion of management-rights clauses in its new agreements. A review of the record, however, shows no specific discussions or tie in between the contract clause and the subject of total conversion of unit positions to non unit management positions and the resulting total elimination of the bargaining unit. The Respondent otherwise maintains that the agreements "expressly" cover the decision and asserts that it:

> inserted a new management-rights clause to clarify its belief that it had the right to make the decision to convert its theaters to manager operated theaters without negotiating with the Union.

More specifically, it contends that the management-rights clause gives it the right to:

> introduce new or improved work methods. . . . processes and procedures of work and to change or eliminate existing methods. . . . processes and procedures or work . . . .

and it otherwise argues that Local 364 failed to timely demand bargaining and that in 1996 Local 125 waived its right to bargain over the decision.

As reiterated by the Board in *Dubuque Packing*, supra:

> It is well settled that the waiver of a statutory right will not be inferred from general contractual provisions. Further, such waivers must be clear and unmistakable. Generally worded management-rights clauses will not be construed as waivers of statutory bargaining rights.

In the *Geiger Ready Mix* case supra, the employer also argued that the union waived its right to notice and an opportunity to bargain over the decision and relied on the following provision in its collective-bargaining agreement:

> Section 1. The company shall have the right to manage the business and direct the working force. Management of the business includes the right to plan, direct, and control all operations; to hire, assign employees to do work, and transfer employees; to promote, demote, discipline, suspend, or discharge employees for just cause; to relieve employees from duty because of lack of work or any other legitimate reasons; to introduce new and improved methods or facilities, or to change existing methods or facilities and the right to make and enforce reasonable rules implemented to carry to the functions of management.

The Board, however, found that the union did not waive its right to bargain about the employer's decision to transfer unit work and further found that above quoted management-rights language, strikingly similar to that involved herein, was too general to meet the clear and unmistakable standard governing the waiver of statutory rights. Moreover, although the Respondent insist that it consistently expressed its intentions to convert "all" its facilities to manager/operator theaters, it does not and apparently can not show that any specific discussions occurred during negotiations that equated or tied in that "intention" with its introduction of a management-rights clause.

Here, in fact, the Respondent adopted a management-rights clause in the 1995 agreement with Local 370, a clause that had been in a predecessor contract with Plitt Theaters, Inc. Howard Rose (president of Local 370 when that management-rights provision was first negotiated), testified that the Union was told the purpose was to enable the Company to update the equipment and accommodate to technological changes in projection work and that the Union had been assured that it was not intended to enable the company to institute manager/operator arrangements, or to otherwise replace the union projectionists with someone else doing the projectionist work. Local 370 Business Agent Henry Berger also testified that the management-rights provision in the contract had been explained to the projectionists as making it possible for the management to introduce new equipment, etc., in the booth without having to negotiate with the Union about whether the equipment should be

installed. Otherwise, when the Union thereafter negotiated with the Respondent, no discussion occurred regarding the purpose of the clause as it might relate to manager/operator staffing in place of projectionist. Yet, at the same time the Respondent proceeded to insert this clause in the agreements with the three local Unions, it also, negotiated and accepted concessions by the Union, which recognized the existence of the units and the position of projectionist, especially in theaters with over four screens. Accordingly, I find the language of the clause "introduce new—methods—change or eliminate existing methods—procedures or work" as it related to transfer of unit employee (projectionist) duties to manager/operators does not unambiguously specify its intentions. This is especially true inasmuch as it then agreed to a partial retention of the projectionist position despite its earlier expressed intentions.

While there was no waiver of the Respondent's right to pursue its position in the future (see the discussion below in respect to GC Exh. 26), there likewise was no clear and unmistakable waiver on the part of the Union. An agreement among parties to a severance pay provision does not constitute a waiver as to work transfer outside the bargaining unit (and where the management-rights clause referred to introduction of new methods as well as subcontracting work), see *Reece Corp.*, 294 NLRB 448, 451 (1989), and here, there is no clear and unmistakable language in the clause nor any evidence in the bargaining history that would allow such on interpretation.

Here, as the several contracts approached their expiration dates, the Respondent decided to unilaterally pursue its concept of hiring new assistant managers with multiple duties including, on a given day, general theater task involving opening, oversight, and closing in addition to the projectionist function. This may be an effective solution to its apparent concern with the matter of having projectionist whose work shift entails non production hours but it does not appear to be only solution, especially in multiplex theaters with many screens, and therefore I cannot find that it is not amendable to bargaining.

The Respondent's solution also is a solution that addresses work place efficiency, however, it is not a solution that arose as a result of any technological development which affected the projectionist work. While several changes occurred well before 1995, and no pertinent technological developments occurred (or were embraced) between 1995 and 1997, the same duties that the union projectionists had been performing in the Respondent theaters prior to the transfer are still required and performed.

Although it appears that technology may in the future effectuate changes such as the elimination of "film" and the use of satellite feed of a show directly to individual theaters (a process apparently being introduced in Europe), this technology is not currently being pursued in the United States and here there is no basis for finding that the transfer of the same film work from projectionist to manager/operators was founded on any new technological development.

Lastly, it is noted that while the Respondent made no cost studies and contends that the purpose of the conversion was to "improve efficiency," the effect of eliminating union projectionists, and having the work done by managers assisted managers who were already on the payroll or by new assistant managers most of whom are paid little more than minimum wage results in labor cost savings.

On February 8, 1996, when Local 125 was attempting to negotiate over the Respondent's decision to go manager/operators and to terminate their collective-bargaining agreement (which had an automatic 60-day renewal provision but no management-rights clause) and Vice President Dunn sent Local 125 Business Agent Earl McLachlan a letter which stated:

> Although Regal Cinemas is not obligated to do so, we would be willing to honor your request to sit down with you and explore other possible alternatives under the following conditions:
>
> 1. Any such meeting or discussions will not be considered and the Union will not claim that the company is now obligated to bargain over those issues or the company's decision to go manager/operator.
> 2. Any further meetings or discussions should not and will not be construed as any extension of the Collective-bargaining Agreements of which we have give notice of termination; and
> 3. Any such meeting or discussion will not constitute a waiver by the company of its rights to terminate those Collective-bargaining Agreements.
>
> If those conditions are acceptable, please sign below and return this document to my attention.

McLachlan testified that he signed and returned the document as requested and that he understood that by signing for Local 125 he was agreeing not to claim that the Company didn't have the right to go manager/operator. Dunn testified that he wanted his waiver to protect the Respondent in going ahead in converting to manager/operator.

The parties then agreed on a 1-year contract affecting four theaters (with a "shared" booth at one six-screen theater where both management and a projectionist split operating hours), wage concessions (except for the Coventry theater where a 50-cent increase was established because that complex had been expanded by five additional screens) and the elimination of several theaters from the agreement. McLachland credibly testified that there was no discussion about the new contract being a phase out contract and no discussion about the Respondent being able to go manager/operator in the future without prior discussions with the Union. However, once the 1-year agreement was reached, there was a discussion as to who would prepare the contract and the Respondent said that since it had problems with unions and attorneys in the past, it had set up a nonnegotiable format which would be utilized for the final document. The final document then signed by the Union contained the management-rights clause but there was no further discussion.

Under these circumstances, I cannot find that the Union's execution of the February 1996 letter agreement constituted a continuing waiver of any right to bargain in the future over management decisions that would transfer projectionist work to manager/operators. I further find that this agreement was for the limited purpose of discussion at the meeting which immediately followed February 8, and the Union only waived any immediate right to claim that the Respondent, by agreeing to that meeting, listening to the Union's proposal and negotiations about its decision, was itself waiving any right to in the future reassert its claim that it was not obligated to bargain over this type of decision. No clarifying discussion was held and no clarifying language was put into the agreement negotiated that would unambiguously show that this was a phase out contract. To the contrary, the Respondent held out the carrot that a successor agreement 1 year hence would be negotiated at the international level. 4

In *Colgate Palmolive Co.*, 323 NLRB 515, 516 (1997), the Board agreed with my decision and amplified its position that a union's acquiescence in an employer's past actions on a particular subject does not constitute a waiver of its right to bargain over such changes for all time. Accordingly, I find that any waiver by Local 125 in 1996, does not relieve the Respondent of its obligation to bargain about its 1997 decision and, as discussed above, no clear and unmistakable waiver otherwise was shown by the inclusion of the generalized management-rights clause in the 1996 contract.

The Respondent also points out that on July 21, 1997, the Company notified Union Local 364 of its decision to convert to manager/operator, that over 1 month later (on August 25) the Union's representative sent a letter to Dunn advising of their desire to meet regarding that notice, and that from July 21, until the last part of September, the Company's efforts to contact the Local went unresponded and it argues that the Union therefore failed to make a timely demand for bargaining. Counsel for Local 364 contacted the Respondent on September 19 and on October 2 a meeting was arranged for October 8. As noted above, at that meeting the Respondent reiterated its position that the decision had been made and that it would only negotiate on the effects of that decision.

The notice given by the Respondent to the Union indicated an irrevocable intention to *not* give the Union any opportunity to bargain about its decision. Thus, in light of the circumstances it is plain that in the fall of 1997 (after the Respondent already had refused to bargain over its decision with the Fort Wayne Local of the same International Union), a formal request to bargain about the decision would be futile, and the Union's failure to quickly respond to the

[4] The Union had suggested a 2-year contract but the Respondent request a 1-year term because it was talking to the International Union concerning possible joint negotiations with the Virginia, Akron-Cleveland, and Fort Wayne Locals and wanted the contracts to expire in the same year.

Employer's notice of its decision is no defense to the employer's unilateral action, see *Golden Bay Freight Lines*, 267 NLRB 1073, 1080 (1983), and cases cited therein. In any event, the Union did attempt to negotiate several days before the effective date for the Respondent's unilateral action and, predictably, the Union's efforts were shown to have been futile. There was no economic crisis alleged that would make timeliness a significant factor, see the *Golden Bay* case, supra, and otherwise there existed a reasonable window of opportunity for at least a few days of negotiation after a Union demand was made. Accordingly, I find that the facts in *Reynolds Metal Co.,* 310 NLRB 995 (1993), where there was no demand at all for bargaining (and where there was no futility factor), cited by the Respondent, are inapposite and I conclude that the Union did not waive its right to bargain over the Respondent's decision.

Under all these circumstances I find that in each instance, the record supports the conclusion that no waiver occurred, that the Respondent preempted the possibility that bargain might take place over its unilateral decision to terminate all its unit employees and transfer their work to manager/operators and that it therefore failed to engage in bargaining on a mandatory subject of bargaining in violation of Section 8(a)(1) and (5) of the Act, as alleged.

D. Release as Condition to Severance Pay

At the last meeting between Local 125 and the Respondent, the day before the Fort Wayne projectionists were terminated on March 28, the Respondent presented its first proposal on severance, the parties continued to discuss this issue and they agreed to an extension of time until April 21, to consider Respondent's offer, as modified.

On April 18, Local 125 sent Respondent a letter accepting its severance pay proposal and it also indicated that the acceptance did not constitute a waiver of "all legal rights belonging to the Union and to the individual employees." In response, Levesque sent a letter dated April 22, in which he claimed that Dunn had clearly stated at the February 19 meeting that a release would be required, asserted that it was the policy and practice of the Respondent to obtain a release agreement in return for severance payments, and concluded that:

> If the members are unwilling to enter into release agreements to receive the severance benefits to which they are otherwise entitled, then the Company will be unwilling to agree to severance under these conditions.

No further discussions regarding the severance issue were held.

The Respondent argues that there exists no obligation, contractual or otherwise, which required the Company to provide severance benefits to displaced workers and that it is appropriate for an employer to request a release agreement in return for severance pay, citing *Gavie v. Stroh Brewery Co.,* 668 F.Supp. 608 (D.C.M.I. 1982). It also argues that the Board has recognized an employer's right to request release agreements in return for severance benefits, as long as the agreements do not affect the employee's right to access the Board concerning incidents arising after execution of the agreements, citing *Independent Stave Co.*, 287 NLRB 740 (1987); *First National Supermarkets,* 302 NLRB 727 (1991); *Phillips Pipe Line Co.*, 302 NLRB 732 (1991); and *Hughes Christensen Co.*, 317 NLRB 633 (1995), cases in which the Board recognized the validity of the releases given in exchange for "enhanced" severance benefits. These cases, however, do not address the subject raised by the General Counsel, namely; whether a release as a condition of reaching an agreement on severance pay is a permissive subject of bargaining and therefore a subject that the employee could not insist upon.

Here, the effect of the Respondent's decision was a mandatory subject of bargaining and the matter of severance pay is an element of that effect. The General Counsel relies upon the Board's decision in *Borden, Inc.*, 279 NLRB 396, 399 (1986), which found:

> The relationship between the permissive and mandatory subjects of bargaining in this case does not exhibit the interdependence required by the Board in *Sea Bay Manor Home*. Obviously, severance pay can be paid pursuant to a several agreement without the execution of a release. If Respondent's argument were accepted, it would mean that a permissive subject of bargaining would become mandatory whenever it was presented together with a mandatory subject. That is not the law.

Accordingly, the matter here is controlled by the rationale of the *Border* case, supra, and I find that the Respondent's insistence on a general release as a condition for entering into a severance agreement affecting the terminated unit employees therefore constitutes a violation of Section 8(a)(1) and (5) of the Act, as alleged.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Union Locals 370, 125, and 364 each are a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material Union Locals 370, 125, and 364 have been and are the exclusive representative of the respective units for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

4. By failing and refusing to give the Union an opportunity to bargain collectively concerning decisions to lay off unit projectionists and to transfer unit work to nonunit managers and assistant managers and by implementing those decisions, March 28, October 13, and November 24, respectively, the Respondents violated Section 8(a)(1) and (5) of the Act.

5. By demanding as a condition to a severance agreement affecting employees in Union Local 125 whose jobs had been eliminated that they sign a general release, Respondent has engaged in and is engaging in an unfair labor practice in violation of Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated the Act by unilaterally assigning bargaining unit work to managers and assistant managers without bargaining with the Union, it will be recommended that Respondent rescind the unilateral change and, henceforth, bargain with the Union concerning any contemplated changes in the wages, hours, working conditions, and other terms and conditions of employment of bargaining unit employees and that the Respondent restore the status quo ante existing prior to its commission of unfair labor practices by reestablishing the projectionist position in a manner consistent with the level and manner of operation that existed prior to the lay off and offer full and immediate reinstatement to all of its bargaining unit employees to their former or substantially equivalent positions, dismissing, if necessary, any temporary employees or employees hired subsequently, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered because of the discrimination practiced against them by payment to them of a sum of money equal to that which they normally would have earned form the date of the discrimination to the date or reinstatement in accordance with the method set forth in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).[5]

The Respondent also shall be required to bargain with Union Local 125 over the severance issue without insisting on employee execution of a general release as a condition of the agreement. Otherwise, it is not considered necessary for a broad Order to be issued.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

[5] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Regal Cinemas, Inc., Knoxville, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union, as the exclusive representative of the employees in the bargaining unit, by unilaterally transferring bargaining unit work which had previously been done by projectionist without bargaining with the Union.

(b) Demanding as a condition to a severance agreement affecting employees whose jobs have been eliminated that such employees sign a general release.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order rescind the unilateral change made with respect to the transfer of projectionist unit work to managers and assistant managers.

(b) On request by the respective Local Union, bargain collectively in good faith concerning the decision to permanently lay off bargaining unit employees and to transfer bargaining unit work to managers and assistant managers.

(c) On request by Union Local 125 bargain over the severance pay aspect of the effect of its decision without insisting on employee execution of a general release as a condition of agreement.

(d) Within 14 days from the date of this Order offer immediate and full reinstatement to all unit employees who were permanently laid off as of March 28, October 12 and November 23, 1997, to their former positions or, if such positions no longer exist, to substantially equivalent employment, without prejudice to their seniority or to other rights and privileges previously enjoyed by them.

(e) Make whole with interest all such laid-off unit employees for any lost wages which they may have suffered as a result of the above described unlawful unilateral changes in the manner set forth in the remedy section of the decision.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days of service by the Region, post at its Fort Wayne, Indiana, Akron, Ohio, and Richmond, Virginia theaters, and mail to all former unit employees employed at these theaters, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Directors for Region 5, 8, and 25 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to give the Union Local 370 an opportunity to bargain collectively concerning our decisions to lay off bargaining unit projectionists and to transfer unit work to nonunit managers and assistant managers before implementing those decisions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the unilateral changes made with respect to the transfer of projectionist unit work to managers and assistant managers, and on request by the Local Union, bargain collectively in good faith concerning our decision to permanently lay off bargaining unit employees and to transfer bargaining unit work to managers and assistant managers.

WE WILL within 14 days from the date of this Order offer immediate and full reinstatement to all unit employees who were permanently laid off as of November 23, 1997 to their former positions or, if such positions no longer exist, to substantially equivalent employment, without prejudice to their seniority or to other rights and privileges enjoyed by them.

WE WILL make whole, with interest, all such laid-off unit employees for any lost wages they may have suffered as a result of the above-described unlawful unilateral changes.

REGAL CINEMAS, INC.